

# Senate Bill 877

Sponsored by Senator DINGFELDER; Senator MORRISETTE, Representatives BARKER, BARNHART, BUCKLEY, SHIELDS

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Modifies definition of "violation" for purposes of removal-fill provisions. Allows civil proceedings to be instituted by person to enjoin permit violations. Changes award of costs of suit and attorney fees from prevailing party to prevailing plaintiff.

## A BILL FOR AN ACT

1  
2 Relating to removal-fill permitting program; creating new provisions; and amending ORS 196.860,  
3 196.870 and 196.875.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 196.860 is amended to read:

6 196.860. (1) If the Director of the Department of State Lands determines that material is being  
7 removed from or filling is occurring in any of the waters of this state without a permit issued under  
8 ORS 196.825, or in a manner contrary to the conditions set out in the permit, or in a manner con-  
9 trary to the conditions set out in an order approving a wetland conservation plan, the director may:

10 (a) Investigate, hold hearings, make orders and take action, as provided in ORS 196.600 to  
11 196.905, as soon as possible.

12 (b) For the purpose of investigating conditions relating to the removal or filling, through the  
13 employees or the duly authorized representatives of the Department of State Lands, enter at rea-  
14 sonable times upon any private or public property.

15 (c) Conduct public hearings in accordance with ORS chapter 183.

16 (d) Publish findings and recommendations as they are developed relative to public policies and  
17 procedures necessary for the correction of conditions or violations of ORS 196.600 to 196.905.

18 (e) Give notice of any proposed order relating to a violation by personal service or by mailing  
19 the notice by registered or certified mail to the person affected. Any person aggrieved by a proposed  
20 order of the director may request a hearing within 20 days of the date of personal service or mailing  
21 of the notice. Hearings shall be conducted under the provisions of ORS chapter 183 applicable to  
22 contested cases, and judicial review of final orders shall be conducted in the Court of Appeals ac-  
23 cording to ORS 183.482. If no hearing is requested or if the party fails to appear, a final order shall  
24 be issued upon a prima facie case on the record of the agency.

25 (f) Take appropriate action for the enforcement of any rules or final orders. Any violation of  
26 ORS 196.600 to 196.905 or of any rule or final order of the director under ORS 196.600 to 196.905  
27 may be enjoined in civil abatement proceedings brought in the name of the State of Oregon. In any  
28 such proceedings the director may seek and the court may award a sum of money sufficient to  
29 compensate the public for any destruction or infringement of any public right of navigation, fishery  
30 or recreation resulting from the violation. Proceedings thus brought by the director shall set forth

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 if applicable the dates of notice and hearing and the specific rule or order of the director, together  
2 with the facts of noncompliance, the facts giving rise to the public nuisance, and a statement of the  
3 damages to any public right of navigation, fishery or recreation, if any, resulting from the violation.

4 (2)(a) In addition to the administrative action the director may take under subsection (1) of this  
5 section, the director may enter an order requiring any person to cease and desist from any violation  
6 if the director determines that the violation presents an imminent and substantial risk of injury, loss  
7 or damage to water resources.

8 (b) An order under this subsection:

9 (A) May be entered without prior notice or hearing.

10 (B) Shall be served upon the person by personal service or by registered or certified mail.

11 (C) Shall state that a hearing will be held on the order if a written request for hearing is filed  
12 by the person subject to the order within 10 days after receipt of the order.

13 (D) May not be stayed during the pendency of a hearing conducted under paragraph (c) of this  
14 subsection.

15 (c) If a person subject to an order under this subsection files a timely demand for hearing, the  
16 director shall hold a contested case hearing according to the applicable provisions of ORS chapter  
17 183. If the person fails to request a hearing, the order shall be entered as a final order upon prima  
18 facie case made on the record of the agency.

19 (d) Neither the director nor any duly authorized representative of the department shall be liable  
20 for any damages a person may sustain as a result of a cease and desist order issued under this  
21 subsection.

22 (e) The state and local police shall cooperate in the enforcement of any order issued under this  
23 subsection and shall require no further authority or warrant in executing or enforcing the order. If  
24 any person fails to comply with an order issued under this subsection, the circuit court of the county  
25 in which the violation occurred or is threatened shall compel compliance with the director's order  
26 in the same manner as with an order of that court.

27 (3) As used in this section, "violation" means removing material from or placing fill in any of  
28 the waters of this state without a permit or **acting** in a manner contrary to the conditions set out  
29 in a permit issued under ORS 196.825.

30 **SECTION 2.** ORS 196.870 is amended to read:

31 196.870. (1) In addition to any enforcement action taken under ORS 196.860, civil proceedings  
32 to abate alleged public nuisances under ORS 196.855 **or to enjoin permit violations** may be insti-  
33 tuted at law or in equity, in the name of the State of Oregon, upon relation of the Director of the  
34 Department of State Lands or by any person in the person's name.

35 (2) Before beginning any action under subsection (1) of this section, a person other than the  
36 director shall provide 60 days notice to the director of the intended action. A person other than the  
37 director may not begin an action under subsection (1) of this section if the director has commenced  
38 and is diligently prosecuting civil, criminal or administrative proceedings in the same matter.

39 (3) The director may institute an action in the name of the State of Oregon for a temporary  
40 restraining order or preliminary injunction if a threatened or existing nuisance under ORS 196.855  
41 **or a permit violation** creates an emergency that requires immediate action to protect the public  
42 health, safety or welfare. The director shall not be required to furnish a bond in such proceeding.

43 (4) The State Land Board, the Director of the Department of State Lands and the employees or  
44 duly authorized representatives of the Department of State Lands shall not be liable for any dam-  
45 ages a defendant may sustain as a result of an injunction, restraining order or abatement order is-

1 sued under this section.

2 (5) A case filed under this section shall be given preference on the docket over all other civil  
 3 cases except those given an equal preference by statute.

4 (6) In any action brought under this section, the plaintiff may seek and the court may award a  
 5 sum of money sufficient to compensate the public for any destruction or infringement of any public  
 6 right of navigation, fishery or recreation resulting from an existing public nuisance under ORS  
 7 196.855 **or a permit violation**. Any money received by the plaintiff under this subsection shall be  
 8 deposited in the Common School Fund.

9 **SECTION 3.** ORS 196.875 is amended to read:

10 196.875. (1) If any person, through negligence, violates ORS 196.810, the Director of the De-  
 11 partment of State Lands, in a proceeding brought pursuant to ORS 196.870, may seek and the court  
 12 may award double a sum of money sufficient to compensate the public for any destruction or in-  
 13 fringement of any public right of navigation, fishery or recreation resulting from such violation.

14 (2) If any person intentionally violates ORS 196.810, the director, in a proceeding brought pur-  
 15 suant to ORS 196.870, may seek and the court may award treble a sum of money sufficient to com-  
 16 pensate the public for any destruction or infringement of any public right of navigation, fishery or  
 17 recreation resulting from such violation.

18 (3) An award made pursuant to this section shall be in addition to and not in lieu of any crim-  
 19 inal penalties imposed for a violation of ORS 196.810.

20 (4) In any action brought under ORS 196.870, the court shall award to the prevailing [*party*]  
 21 **plaintiff** the costs of suit and reasonable attorney fees at trial and on appeal. Subject to the pro-  
 22 visions of ORS 20.140, any costs and attorney fees so awarded to the director shall be deposited in  
 23 the Common School Fund to offset the director’s expenses of bringing such action.

24 **SECTION 4. (1) The amendments to ORS 196.860 and 196.870 by sections 1 to 2 of this 2009  
 25 Act apply to violations occurring on or after the effective date of this 2009 Act.**

26 **(2) The amendments to ORS 196.875 by section 3 of this 2009 Act apply to actions brought  
 27 under ORS 196.870 on or after the effective date of this 2009 Act.**

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